THE CHANGE IN TRUST POLICY

THE tendency to disregard long-time social interests in favor of immediate and often petty advantage seems to be one of the inescapable incidents of a post-bellum period. It emerges in fields so diverse as education, domestic relations, trade, and international politics. It exhibits itself most clearly in an attitude of mind: let things in general alone. "Everything" is supposed to take care of itself in times of peace, so that the only proper business of men and women is to attend to their own private affairs. Other people and the general situation must be molested as little as possible lest matters go from bad to worse. This frame of mind is so prevalent among common men that evidence of its existence, even in so cloistered a tribunal as the Supreme Court, scarcely draws the attention, much less the criticism, of the public. Yet no explanation of the decision of the Supreme Court in *United States* v. *United States Steel Corporation*[1] can be complete without taking account of the prevalent psychological reaction from the strenuosity of war.

Decisions of our highest court, however, cannot be allowed to rest simply on a popular mood. They are always justified in the opinions by reference to the reason in the law, and however much the individual judgments of the members of the court may be influenced by personal preconceptions or popular psychology these things get little recognition in the reports. There all is made to appear dependent upon the logic of legal rules and the clear evidence of the facts. Accordingly it seems worth while to examine the background of legal doctrine and the economic conclusions the application of which in this case has produced so remarkable a result: the unqualified indorsement of the greatest industrial combination in history.

It must be admitted that the decision is not capricious. It is supported by the high authority of precedent. It is the logical outcome of the important judicial legislation of 1911, and upon that

[1] 251 U. S. 417 (1920).

legislation it professedly[2] rests. The new construction given the Sherman Act by the Standard Oil and Tobacco cases was grounded, so it was averred,[3] upon principles of the common law. It is necessary, therefore, in order to appraise the doctrine enunciated by the late Chief Justice in those rulings, to revert to the common law to find what rules it set up governing market conduct as such It seems possible to bring these common-law rules under three heads: (I) the doctrine of contracts in restraint of trade; (II) the doctrine of conspiracy to monopolize; (III) the doctrine of unfair competition. While the enumeration may not be exhaustive,[4] it will serve our present purpose. These doctrines will be considered in order.

I

"Restraint of trade" was a term having in the early common law a definite, technical meaning.[5] Its use was confined to covenants, usually ancillary to some other and principal engagement, to refrain from carrying on an occupation or business Originally all such were void[6] and possibly of positive illegality, inasmuch as in the sixteenth-century industrial system every man had his place and was supposed to stay in it. Such covenants, therefore, not only worked to deprive a man absolutely of a livelihood, but also tended to promote change and flexibility, which was exactly what the social system was organized to prevent. By the beginning of the eighteenth century, however, the gild system had reached a moribund state, and the legal rules founded upon it were subject to modification in accordance with the altered circumstances. In the leading case of *Mitchel* v. *Reynolds*[7] (1711) it was determined that such covenants, where given for the protection of one party in

[2] See particularly pages 450–451 of the opinion. I have reference to the doctrine that "unreasonable" conduct (presumably extortionate price policy or unfair aggression upon pseudo competitors) is essential to the illegality of combinations suppressing competition.

[3] United States *v.* Standard Oil Co., 221 U. S. 1. 51 (1911).

[4] With respect to the crime of engrossing, see *infra*, pp. 828–831.

[5] 2 EDDY, COMBINATIONS, 779–790 United States *v* Addystone Pipe Co., 85 Fed. 271 (1898); Fisher Mills Co. *v.* Swanson 76 Wash 649 137 Pac. 144 (1913).

[6] The Dyer's Case, Y. B 2 HEN. V. (Pasch., f. 5, pl. 26) (1415). It is not clear from the report whether it was the usual engagement supplementary to the sale of a business or the apprenticeship of the covenantor.

[7] 1 P. Wms. 181, 1 Smith L. C. 406; for an early American authority to the same effect see Alger *v.* Thatcher, 19 Pick. (Mass.) 51 (1837).

a voluntary contract for the sale of a business or of apprenticeship or between partners upon adequate consideration, and limited to a particular area or a specified period, were valid and enforceable. The tendency toward the relaxation of the restrictions upon freedom of contract, so characteristic of the century which followed, is well exhibited in the development of this doctrine. The existence of a time limitation seems to have gradually lost weight,[8] and the rule was restated in *Young* v. *Timmins*[9] (1831): "Any agreement . . . in general restraint of trade is illegal and void. But . . . a partial restraint (as to space) may be good or bad as the consideration is adequate or inadequate." The courts presently ceased to test the adequacy of the consideration[10] for these promises, moreover, and they were brought into conformity on this point with contracts generally. About the same time the enforceability of these agreements or the validity of bonds conditioned upon their fulfillment was made to hinge upon another consideration: the reasonableness[11] of the restriction imposed upon one's pursuit of his calling. Reasonableness depended upon the extent of the business of the covenantor, the nature of the trade, the circumstances of the parties, and finally the effect upon the public interests.[12] This change in the law upon restraint of trade took place gradually both in England and in America. As late as 1873, it seems to have been the view of courts in this country that the doctrine of reasonableness applied only to partial restraints; a general restraint being regarded as void *ipso facto*. Thus the Supreme Court declared[13] in that year: "Of course, a contract not to exercise a trade generally would be obnoxious to the rule,

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[8] Bunn *v.* Guy, 4 East, 190 (1803).

[9] 1 Tyr. 226, 241 (1831).

[10] Hitchcock *v.* Coker, 6 Ad. & El. 438, 456 (1837).

[11] Horner *v.* Graves, 7 Bing. 735 (1831).

[12] C. J. Tindal in Horner *v.* Graves, *supra*, at p. 743, stated the test to be: "by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." The fuller statement of the "rule of reason" given in the text above follows closely the opinion in Hubbard *v.* Miller, 27 Mich. 15, 19 (1873).

[13] The Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64 (1873). But qualification of the full and strict meaning of this language may perhaps be drawn by the further remarks of the court to the effect that: "This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State."

and would be void." But eventually the test of reason came to supplant the test of extent altogether. In England the rule was definitely so established by *Maxim Company* v. *Nordenfelt* [14] (1893); in the United States the rule as above stated is not so definitely determined. Cases in the federal jurisdiction [15] and in one or two states,[16] however, validate restraints covering substantially the entire country.

The leading cases upon restraint of trade have been thus briefly passed in review in order to call attention to the fact that the cases up to the time of the enactment of the Sherman Act in which the doctrine of reasonableness was developed in support of contracts "in restraint of trade" involved agreements not to carry on a trade or business in competition with another in consideration of an independent and principal transaction, such as the sale of one's trade and good will, instruction in a craft or in a secret process, or the formation of a partnership or corporation. The so-called "rule of reason," therefore, of which so much has been made in the opinions of the late Chief Justice White, had a very limited and restricted field of application at common law.

It is clear that "restraint of trade" as used in Section I of the Sherman Act has not the technical and narrow meaning which it had at common law; but it is believed that in the wider sense in which it is there used the common law affords but slight and inconclusive precedent for making the illegality of a contract eliminating competition dependent upon the unreasonableness of its provisions, particularly relative to the protection of the interests of the parties concerned. "Restraint of trade" as employed in the Sherman Act covers agreements or combinations among competitors for the single or primary purpose of obstructing or stifling competition among themselves and gaining control of the market. This meaning is manifest from the Congressional debates [17] pre-

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See also as indicative of the same trend, Hubbard *v.* Miller, 27 Mich. 15, 22 (1873), in which for the sake of argument the court "supposes" a contract imposing an unlimited restraint to be valid.

[14] [1893] 1 Ch. 630.

[15] Knapp *v.* Adams Co., 135 Fed. 1008 (1905); Prame *v.* Ferrell, 166 Fed. 702 (1909).

[16] Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 (1887); Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 (1888); Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 (1894); Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509 (1898).

[17] 21 Cong. Rec. 2456 *et seq.*

ceding the passage of the Act as well as from the title and whole tenor of the Act itself, and from the beginning the courts have not hesitated to interpret [18] Section I in this broader way. Indeed this use of the term in a loose way had become not uncommon [19] in the courts generally during the years preceding the passage of the Sherman Act. The industrial world was experimenting with various devices for reducing the rigors of competition. The object was to secure greater gains through concerted action in price-making and control of output, while avoiding so far as possible the form of monopoly, and consequently its ill repute. Pools, trade associations, gentlemen's agreements, trusts, all in manifold varieties, were the products of this movement. So patently predatory was the purpose in these schemes and so flagrant were the abuses in the methods employed against would-be competitors and the public that the popular outburst against "trusts" could not fail to be echoed in the courts. But under what form of law were these combinations to be curbed? In many jurisdictions [20] the protest was promptly voiced in antitrust statutes. But as is usually the case the common law was gradually brought into line with the popular will and afforded a more effective, though tardy, curb to the movement. This was accomplished by means of an appropriation to a new use, of the technical term "restraint of trade," which now came to signify any restriction of competition with the purpose or intent to control the market. The market over which control was sought might be only local [21] or it might be a national market.[22] It made no difference. In either case this sort of "restraint of trade," once

[18] United States *v.* Freight Ass'n, 166 U. S. 290, 343 (1897); United States *v.* Chesapeake Fuel Co., 115 Fed. 610 (1902); United States *v.* Northern Securities Co., 193 U. S. 197 (1904); United States *v.* Standard Oil Co., 221 U. S. 1 (1911); United States *v.* American Tobacco Co., 221 U. S. 106 (1911). The cases cited are but indicative of the general trend from which there has been no exception.

[19] Morris Run Coal Co. *v.* Coal Co., 68 Pa. 173 (1871); Skrainka *v.* Scharinghausen, 8 Mo. App. 522 (1880); Craft *v.* McConoughy, 79 Ill. 346 (1875); Western Wooden Ware Ass'n *v.* Starkey, 84 Mich. 76, 47 N. W. 604 (1890).

[20] Prominent in the list of states taking direct action in this manner were: Kansas, Texas, Nebraska, Missouri, Michigan, Illinois, Maine, Kentucky, and North Carolina. See W. S. STEVENS, INDUSTRIAL COMBINATIONS AND TRUSTS, 43.

[21] As in Chapin *v.* Brown, 83 Iowa, 156, 48 N. W. 1074 (1891); and Comer *v.* Burton-Lingo Co., 24 Tex. Civ. App. 251, 58 S. W. 969 (1900).

[22] Harding *v.* Amer. Glucose Co., 182 Ill. 551, 55 N. E. 577 (1899); Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102 (1889).

established, was condemned for its tendency to prejudice the public interests. The courts viewed such action or such an object as unlawful; not *malum in se*,[23] perhaps, but fully within the doctrine of conspiracy when undertaken by several. Contracts involved in such operations were unenforceable, being contrary to public policy.[24] It was recognized that these restraints were essentially and substantially identical with monopoly, differing only in degree of unification of power. They were the puppies, monopolies the grown dogs. Consequently the law of conspiracy was held to reach them, and in conjunction with the more rigorous penal measures presently provided by legislation it has proven a reliable if insufficient remedy.[25]

This evolution of the common law which we have been tracing was not uniform in all the states. Or at least it may be stated it was not accomplished everywhere without encountering decisions inconsistent with the main line of development. In several cases in this country and Canada it has been held that agreements among competitors fixing prices, dividing territory, restricting output, etc., are not in themselves unlawful or against public policy, though they may become such by reason of the effects of their operation.[26] Thus it was stated in *Herriman* v. *Menzies*,[27] that:

"Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are *reasonable*, and do not

[23] "The illegality of a contract or combination for the restraint of competition does not lie in the agreement not to compete, but in its reflex injury to the public." Pocahontas Coke Co. *v.* Powhatan, etc. Co., 60 W. Va. 508, 525, 56 S. E. 264 (1906).

[24] Emery *v.* Ohio Candle Co., 47 Ohio, 320, 24 N. E. 660 (1890); Clark *v.* Needham, 125 Mich. 84, 83 N. W. 1027 (1900).

[25] The writer does not wish to be understood as implying that this development of the law was adequate to extirpate the evil. Administrative regulation was essential and even that has not demonstrated its power to do more than check the movement.

[26] Central Shade Roller Co. *v.* Cushman, 143 Mass. 353, 9 N. E. 629 (1887); Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 (1899); Skrainka *v.* Scharinghausen, 8 Mo. App. 522 (1880); Herrimen *v.* Menzies, 115 Cal. 16, 44 Pac. 660 (1896); Over *v.* Byram Foundry Co., 37 Ind. App. 452, 77 N. E. 302 (1906); Ontario Salt Co. *v.* Merchants Salt Co., 18 Grant Ch. (U. C.) 540 (1871); Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 (1888); Nat'l Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 (1891); Gloucester Glue Co. *v.* Russia Cement Co., 154 Mass. 92, 27 N. E. 1005 (1891).

[27] All italics mine. 115 Cal. 16, 22, 44 Pac. 660 (1896).

include *all* of a commodity or trade, or create such restrictions as to *materially* affect the freedom of commerce."

It is clear from this passage as well as from others in the cases cited that what was attempted was the application of the "rule of reason" to "restraints upon trade" in the newer and broader sense, just as it had been applied to the doctrine in its earlier and narrower connotation. This would certainly have been unwarranted,[28] since the term was being used to cover situations more nearly approaching monopolization than the sale of good will or like innocent transactions. Nevertheless this construction of the doctrine of restraint of trade is now the unquestioned law in England.[29]

Fortunately the authorities in this country, resisting this mistaken lead and holding restraints of trade imposed with intent to control the market unqualifiedly illegal, are numerous [30] as well as notable. On the basis of the cases cited, no doubt can be entertained that at common law, in the majority of American jurisdictions, combinations to suppress competition and control prices are against public policy and illegal under the law of conspiracy,

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[28] Simply on grounds of legal logic.

[29] Leading cases are: Wickens *v.* Evans, 3 Y. & J. 318 (1829); Collins *v.* Locke, 4 A. C. 674 (1879); Mogul S. S. Co. *v.* McGregor, [1892] A. C. 25; Commonwealth *v.* Adelaide S. S. Co., [1913] A. C. 781.

[30] Bailey *v.* Ass'n of Master Plumbers, 103 Tenn. 99, 52 S. W. 853 (1899); Morris Run Coal Co. *v.* Barclay, 68 Pa. 173 (1871); Arnot *v.* Pittston Coal Co., 68 N. Y. 558 (1877); Salt Co. *v.* Guthrie, 35 Ohio, 666 (1880); Chapin *v.* Brown Bros., 83 Iowa, 156, 48 N. W. 1074 (1891); Craft *v.* McConnoughy, 79 Ill. 346 (1875); Anderson *v.* Jett, 89 Ky. 375, 12 S. W. 670 (1889); India Bag. Ass'n *v.* Kock, 14 La. Ann. 168 (1859); Pocahontas Coke Co. *v.* Powhatan, 60 W. Va. 508, 56 S. E. 204 (1906); Milwaukee Mason *v.* Niezerowski, 95 Wis. 129, 70 N. W. 166 (1897); Stewart *v.* Stearns Co., 56 Fla. 570, 48 So. 19 (1908); Nester *v.* Brewing Co., 161 Pa. 473, 29 Atl. 102 (1849); Clark *v.* Needham, 125 Mich. 84, 83 N. W. 1027 (1900); More *v.* Bennett, 140 Ill. 69, 29 N. E. 888 (1892); Judd *v.* Harrington, 139 N. Y. 105, 34 N. E. 790 (1893); Vulcan Co. *v.* Powder Co., 96 Cal. 510, 31 Pac. 581 (1892); Getz *v.* Federal Salt Co., 147 Cal. 115, 81 Pac. 416 (1905); Texas Oil Co. *v.* Adoue, 83 Tex. 650, 19 S. W. 274 (1892); Cummings *v.* Union Bluestone Co., 164 N. Y. 401, 58 N. E. 525 (1900); Lufkin Rule Co. *v.* Fringeli, 57 Ohio, 596, 49 N. E. 1030 (1898); Santa Clara, etc. Lumber Co. *v.* Hayes, 76 Cal. 387, 18 Pac. 391 (1888); Brent *v.* Gay, 149 Ky. 615, 149 S. W. 915 (1912); United States *v.* Addystone Pipe Co., 85 Fed. 271 (1898); De Witt Wire Cloth Co. *v.* New Jersey Wire Cloth Co., 14 N. Y. Supp. 277 (1891); Emery *v.* Candle Co., 47 Ohio St. 320, 24 N. E. 660 (1890); Gibbs *v.* McNeeley, 60 L. R. A. 152 (1902). Cases involving public service corporations have been omitted as resting on slightly different principles.

without regard to the conditions bringing about the combination or the actual consequences to the public. The conditions of competition may be ruinous and the prices charged and business policies followed be altogether reasonable, but these afford no excuse for the deliberate suppression of competition in any market.[31] A few excerpts from the opinions cited will indicate that the courts were mindful of the caution necessary in adopting an old phrase to cover a new situation. In *Cummings* v. *Union Bluestone Company* [32] the court stated:

"It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity."

"It is no answer," said the court in *Salt Company* v. *Guthrie*,[33] "to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." And in *Pocahontas Coke Company* v. *Powhatan Coal Company* [34] it was declared that, "A contract which is charged to be in restraint of trade is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its powers of performance[35] when fully exercised." Finally, in the words of now Chief Justice Taft in the oft-quoted opinion in the *Addystone Pipe Case*,[36] ". . . where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was *nothing to justify or excuse the restraint*,[37] that it would necessarily have a tendency

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[31] People *v.* Sheldon, 139 N. Y. 251, 34 N. E. 785 (1893); State *v.* Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417 (1913), and cases above cited.

[32] 164 N. Y. 401, 404, 58 N. E. 525 (1900).

[33] 35 Ohio, 666, 672 (1880).

[34] 60 W. Va. 508, 525, 56 S. E. 264 (1906).

[35] Contrast with this the *dictum* of Justice McKenna in the Steel Corporation Case: "The law does not make . . . the existence of unexerted power an offence. It . . . requires overt acts." 251 U. S. 417, 451 (1920).

[36] 85 Fed. 271, 282 (1898).

[37] Italics by the present writer.

to monopoly, and therefore would be void. . . . We do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract." In these opinions there is no disposition evinced to carry over the "rule of reason" which applied to contracts in restraint of trade as that phrase was understood at early common law to the totally unlike situation which it was eventually adopted to cover.

II

The "rule against monopolies" was a product of the political struggle of the seventeenth century which culminated in the Puritan Revolution. It is but another example of the responsiveness of the English legal system to the political and social thought of the people whom it governs, a quality so essential to institutional steadiness and progress that one wonders why the judiciary and the lawyers have ever been so zealous to conceal it. The rule was aimed at the royal prerogative of granting exclusive privileges [38] to conduct specific trades usually within restricted areas in the kingdom. The frequently cited and authoritative "Case of Monopolies" [39] decided in 1602 denied validity to letters patent from the Crown to "have and enjoy the whole trade, traffic and merchandize of all playing cards" within the realm. Shortly afterward [40] the common law as declared in this case was reënforced by statute, and English sovereigns ever since, mindful of the experience of Charles I, have not tempted fate by disregarding it.[41]

But the popular passion and legal logic which had accomplished this demission of the Crown were not spent. They were directed to the prevention of the evils which were perceived to issue from

[38] This power was probably evolved from the ancient custom of the Crown to charter first the merchant gilds and later the craft gilds. By clearly limiting the scope of their activities and giving plenary powers within their jurisdiction the King was enabled to provide fairly efficient local administration without sacrifice of royal prestige, which moreover not only cost him nothing but yielded a goodly revenue. Incidentally such charter-granting tended to enhance the royal authority at the expense of the seignioral powers of numerous lords and barons.

[39] Darcy *v.* Allen, 11 Coke, 84 b.

[40] 21 JAC. I, c. 3 (1623).

[41] The statute came up for consideration in East India Co. *v.* Sandys, Skin. 165, 90 Eng. Rep. 76, and though the company was defeated in its action against an interloper, it appears the charter of the company was considered to fall within the express exceptions of the statute of 1623.

power to control the market however acquired. The main source had been stopped by 21 James I, chapter 3; a lesser source, from schemes carried out by private contract, was blocked by an easy adaptation of the law of conspiracy, that perennial catchall bag of the common law. Attempts in the seventeenth and eighteenth centuries, however, to establish monopolistic control in a market by joint action of traders do not appear to have been common. And this is not surprising when one considers that it was the period of the decay of the gilds: a time when most of the ambitious masters would be extremely jealous of their independence and violent partisans of freedom of trade. But wherever such attempts at market domination came before the courts [42] they were roundly denounced and held indictable as conspiracies. There seems little doubt that at least up to the latter part of the nineteenth century the law condemned every combination looking toward a unified control of any line of business with the power to raise prices,[43] and no other

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[42] Anonymous, 12 Mod. 248 (1699); King *v.* Norris, 2 Kenyon's Rep. 300 (1758).

[43] People *v.* North River Sugar Refin. Co., 54 Hun, 354, 7 N. Y. Supp. 406 (1889), 121 N. Y. 582, 24 N. E. 834 (1890); State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279 (1892); State *v.* Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155 (1890); Standard Oil Co. *v.* State, 117 Tenn. 618, 100 S. W. 705 (1906); National Harrow Co. *v.* Bemet, 21 App. Div. 290, 47 N. Y. Supp. 462 (1897); National Harrow Co. *v.* Hench, 83 Fed. 36 (1897); Chicago Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770 (1905); American Strawboard Co. *v.* Strawboard Co., 65 Ill. App. 502 (1895); Bishop *v.* Amer. Preserv. Co., 157 Ill. 284, 41 N. E. 765 (1895); Distilling Co. *v.* People, 156 Ill. 448, 41 N. E. 188 (1895); Harding *v.* Amer. Glu. Co., 182 Ill. 551, 55 N. E. 577 (1899); Richardson *v.* Buhl, 77 Mich. 632, 660, 43 N. W. 1102 (1889); Cont. Wall Paper Co. *v.* Voight, 148 Fed. 939 (1906); State *v.* Armour Co., 173 Mo. 356, 73 S. W. 645 (1903); Finck *v.* Schneider Co., 187 Mo. 244, 86 S. W. 213 (1905); Slaughter *v.* Thacker Coal Co., 55 W. Va. 642, 47 S. E. 247 (1904).

To similar effect are the early decisions under the Sherman Act. United States *v.* Freight Ass'n, 166 U. S. 290 (1897); United States *v.* Joint Traffic Ass'n, 171 U. S. 505 (1897); United States *v.* Chesapeake Fuel Co., 105 Fed. 93 (1900), 115 Fed. 610 (1902).

Other cases involving genuine contracts in restraint of trade, or sale of entire output, held void because constituting part of a general scheme to monopolize, follow: Wright *v.* Ryder, 36 Cal. 342 (1868); Western Wooden-Ware Ass'n *v.* Starkey, 84 Mich. 76, 47 N. W. 604 (1890); Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1 (1903); Merch. Ice Co. *v.* Rohrman, 138 Ky. 530, 128 S. W. 599 (1910); Shawnee Compress Co. *v.* Anderson, 209 U. S. 423 (1908); Merz Capsule Co. *v.* Capsule Co., 67 Fed. 414 (1895); Comer *v.* Burton-Lingo Co., 24 Tex. Civ. App. 251, 58 S. W. 969 (1900).

Contra: Oakdale Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 (1894); Davis *v.* Booth Co., 131 Fed. 31 (1904); Trenton Potteries *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 (1899);

situation. It made no difference whether the attempt to influence prices were local or general in its scope,[44] whether the policy pursued were extortionate or moderate,[45] whether the combination were partial or all-inclusive, or whether or not an attempt was made to establish and maintain the power by exclusive practices.[46] The gist of the offense was conspiracy, so that the successful pursuit of his trade by any competitor more skilled or efficient than others could never have become unlawful[47] even upon the hypothesis that the independent growth of his business continued till he stood alone in the field. While it might be expected that the evils of monopoly might result as well from a monopoly thus secured as from one originating in any other manner, what might not be expected was that monopoly should originate in this way. To any one cognizant of the wide margin which must be allowed in all commercial affairs for simple fortuities the hypothesis is preposterous. When, furthermore, account is taken of the brevity of a man's active business career and the fact that genius may safely be classified as an acquired trait and non-transmissible, it would have been singular indeed to have found the ever-practical common law providing against such a remote eventuality.

It is true, therefore, as has been pointed out,[48] that monopoly

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Booth & Co. *v.* Seibold, 37 Misc. 101, 74 N. Y. Supp. 776 (1902). See also Gloucester Glue Co. *v.* Russia Cement Co., 154 Mass. 92, 27 N. E. 1005 (1891).

[44] Fisher Mills Co. *v.* Swanson, 76 Wash. 649, 137 Pac. 144 (1913).

[45] Chicago Coal Co. *v.* People, 214 Ill. 421, 73 N. E. 770 (1905); United States *v.* Chesapeake Fuel Co., 105 Fed. 93 (1900).

[46] In recent years there has been a growing disposition to regard this as the essential core of the doctrine of monopolization, — see A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 830, — and it is supported by a few cases, *e. g.*, U. S. Chem. Co. *v.* Provident Chem. Co., 64 Fed. 946 (1894); United States *v.* Nelson, 52 Fed. 646 (000); Dolph *v.* Troy Mach. Co., 28 Fed. 553 (1886); United States *v.* The Prince Line, 220 Fed. 230 (1915); United States *v.* American Canning Co., 230 Fed. 859 (1916).

But a survey of the cases above cited does not support this view. *Cf.* Tuscaloosa Ice Co. *v.* Williams, 127 Ala. 110, 28 So. 669 (1899); American Strawboard Co. *v.* Peoria Strawboard Co., 65 Ill. App. 502 (1895).

[47] See opinion in Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077 (1896).

[48] A very clear declaration to this effect was made by Mr. J. B. Warner, counsel for plaintiff in Central Shade Roller Co. *v.* Cushman, 143 Mass. 353, 359, 9 N. E. 629 (1887). "It is sometimes said," he declared, "that the law is jealous of any interference with competition, and this may appear at first sight as an independent principle, and one upon which a legal decision may be based. But when the cases are examined, it will appear that an interference with competition is illegal only when accomplished by illegal means, as by restraint of trade, forestalling, conspiracy, or

per se is not obnoxious to the common law; or, as it is more frequently stated, there exists no independent principle of the common law compelling competition. But the attempts to monopolize which very clearly and unequivocably were condemned by the common law consisted [49] in confederated efforts to bring about a unification of the management of the whole or approximately the whole of the business in an industry or trade in any market area by the process of absorption or the process of exclusion of competing units. Since the pursuit of either policy might lead to the same result, and since, except for the process of "natural selection," they exhausted the possible pathways to the disfavored goal, both were condemned. It will be perceived, as was mentioned above, that the difference between "restraints upon trade" as that phrase came latterly to be understood and attempts to monopolize was a difference only of form or of degree. Monopolization was simply the more far-reaching, the more pervasive, the more permanent scheme for controlling the market. Monopolization ordinarily reached back to a command over the production processes. It implied a unification of the directing power over the methods and terms of conducting an industry or line of trade. It implied a de-individuation of all the business units coming within the control of the single authority, not necessarily in name but absolutely in fact. The essence of an illegal attempt to monopolize was a conspiracy to achieve this end. Whenever men concerted together for the primary purpose of acquiring this dominant control of affairs in a line of trade, they were guilty of conspiracy, however legitimate might be the means employed to realize their purpose. The use of commercial spies, railroad rebates, local price-discriminations, exclusive dealer agreements, on the one hand, or resort to covenants technically in restraint of trade, bogus independent concerns, "fighting brands," and similar devices, on the other hand, served but to aggravate the offense. They were not essential elements in the conspiracy; the existence of the unlawful object was sufficient.

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something similar. *There is no independent legal principle in favor of competition which can carry us beyond the other and more familiar doctrines of the law.*" (Italics mine.)

[49] It is instructive to contrast with this definition the situation brought about by large-scale coöperative enterprises, upon the lawfulness of which the courts never have left any doubts. Rex *v.* Webb, 14 East, 406 (1811); Pratt *v.* Hutchinson, 15 East, 511 (1812).

In short, it appears the courts were not unwilling to risk the establishment of unified control in an industry as the incidental outcome of free and active competition, but they were unwilling to risk its establishment as the intended result of a deliberate plan entered into by competitors, or, it may be added, by a group of individuals within any one firm.[50]

Once the fact was established of the attempt to monopolize, moreover, as in the case of agreements in restraint of trade, it was immaterial how the power might be used. The fact that it might have been used moderately could not avail to expiate the offense. For, as was frequently pointed out,[51] it was the danger to the public interest from the existence of the power, not the evils from its abuse, which constituted the reason for the rule. To any one even slightly familiar with our industrial history it must be manifest that any other interpretation would always have proven quite futile. To have required affirmative proof of the ill effects of every attempt to monopolize would have made nearly every one of the industrial combinations attacked in the last forty years secure in its predatory privilege. This would have been true not because the baneful effects may not have existed, but because of the endless devices and subterfuges, to the employment of which the way would have been opened to the monopolists for covering up and explaining away the specific consequences of their behavior. If the prices were higher than those previously prevailing, may this not have been due to a change in the general price level, or to the exhaustion of an essential source of raw material, or to the success of organized skilled labor? The prices may even have been lower than previously prevailing competitive prices, but every one will agree that that in itself would be far from constituting a complete vindication of monopoly. Were the prices lowered as much as they should have been in view of supervening technological improvements or the advance in the external economies of the industry,

[50] Patterson *v.* United States, 222 Fed. 599 (1915); affirmed, 238 U. S. 635 (1915).

[51] State *v.* Standard Oil Co., 49 Ohio, 137, 186, 30 N. E. 437 (1892): "Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what *usually* happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others."

or the change in the general price level, or the increase in the efficiency of manual labor? But aside from the matter of price policy there are questions even more to the point from the long-time, social point of view. Have mechanical progress and the increase in administrative efficiency in the industry been maintained? Or has progress in these respects kept pace with similar tendencies in other industries? To answer these questions with definiteness and certainty is simply impossible.[51a] Economists differ widely in their interpretations of the vast maze of industrial facts which such questions bring up. Courts would flounder in the mire of dubious data and shifting speculations into which they would be plunged by undertaking such an inquiry. No settled rules and principles could possibly issue from such litigation to serve as a guide to business activity. The public interests will be far better safeguarded in these cases by holding the tendency of such arrangements generally to prey upon public well-being a sufficient ground for condemning them. These considerations seem to have been appreciated by judges in early cases, and were wisely made the basis of a majority of their decisions.

In this connection some reference should be made to the crime or crimes of forestalling, regrating, and engrossing. It is probable that these offenses originally consisted in nothing but the carrying on of wholesale operations in trades in which, because of their generally local character, the intervention of middlemen between producers and retail dealers was considered unnecessary. It was an easy step in medieval economic reasoning to pass from the unnecessary to the pernicious. So the practice of buying up large quantities of certain "necessaries," or provisions, to resell at a later time in gross, was from a very early date forbidden.[52] The law upon the subject was, one may say, codified in a statute of 5 and 6 Edw. VI. The measure does not appear, however, to have been effective in preventing the establishment of a wholesale distribution system for necessaries as it was for other merchandise. The settled disuse of the statute for its original purpose, however, did not prevent its adoption for another purpose when the occasion arose.

[51a] See *infra*, Part II, June Number summary.

[52] 3 INST. 196; 1 HAWK. P. C., c. 80, § 3; and 4 COM. DIG. 68; 1 EDDY, COMBINATIONS, 37–45.

In the latter part of the eighteenth century the widening of the markets under pressure of improvements in the productive processes, coming as it did before there occurred any considerable changes in the methods of communication and transportation, offered great opportunity for the operations which now go by the name of "cornering the market." These nefarious transactions, bad enough in the case of ordinary commodities, were particularly obnoxious when the supply of one of the necessaries of life to large bodies of consumers in the growing urban centers was cut off. Consequently a remedy had to be provided. It was found [53] in the adaptation of these ancient crimes. But it became necessary again to recognize their common-law origin, the statute 5 and 6 Edw. VI, c. 14, having been repealed by 12 George III, c. 71 (1771), on account of the inconsistency between its traditional construction and the tenets of the new social policy of trade freedom. Nevertheless there was sound support for the new application of the old offenses, since what it was aimed to prevent in both cases was deviation from the "due course of trade," and the enhancement of prices.[54]

The success of the Manchester school in popularizing the *laissez-faire* doctrines during the first half of the nineteenth century, however, was so tremendous that these common-law offenses went the way of most other restrictions upon freedom of contract. By 7 and 8 Victoria, chap. 24, prosecution for these offenses under the common law was absolutely prohibited. It thus appears that in England [55] since 1844 there has been nothing illegal in an attempt to "corner the market" even for a kind of provisions [56] if conducted by an individual. An individual can buy up any quantity of any commodity he chooses, and whatever his motives the law will not penalize his actions.[57]

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[53] King *v.* Waddington, 1 East, 143 (1800); King *v.* Rusby, 2 Peake N. P. Cas. 189 (1800).

[54] BLACKSTONE COMM., bk. iv, chap. 12; 2 Cooley's ed. of BL. COMM., 3 ed., 157.

[55] Rex *v.* Hilbers, 2 Chitty, 163 (1818).

[56] Just what constituted "necessaries" was a point which gave the courts not a little trouble, but it seems clear that an individual operating independently at any time under the common law might with impunity "corner" the market in horseshoes, for example, and be entitled to enforce in the courts any contract entered into in execution of the plan.

[57] Pettamberdass *v.* Thackoorseydass, 5 Moore Ind. App. 109 (1850).

In so far as the offenses of forestalling, regrating, and engrossing became a part of the law of this country, it was by virtue of their being a part of the common law at the time of colonization. As that was prior to the change in their construction noted above, and as the offenses in their original meaning had become obsolete,[58] it is extremely doubtful if there are any such crimes as forestalling, regrating, and engrossing by the common law of these United States.[59] The books do not afford a single record, so far as the writer has been able to find, of an indictment in an American court for these common-law offenses. A "corner" manipulated by an individual, it may be concluded, whether in a common necessary or an ordinary article of commerce, is not a criminal offense by the common law in the principal jurisdictions in the United States,[60] though it has been made such quite generally by statute. Nevertheless contracts made in pursuance of such schemes are undoubtedly against public policy [61] and unenforceable in the courts regardless of statutory condemnation.[62] Even this, however, does not mean that if an individual or a corporation should acquire dominance or control in any market as the result of a competitive struggle by methods legal and fair his or its contracts would be unenforceable. Motive or purpose has always been recognized as an important element in such transactions,[63] and in the absence of a

[58] WHARTON, CRIMINAL LAW, 11 ed., § 2210; STORY, SALES, 4 ed., 585.

[59] Raymond *v.* Leavitt, 46 Mich. 447, 9 N. W. 525 (1881).

For a contrary view see E. A. Adler, "Monopolizing at Common Law," 31 HARV. L. REV. 246.

[60] United States *v.* Patten, 226 U. S. 525 (1913), was a case involving a conspiracy to corner a market under the Sherman Law.

[61] Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39 (1897); Sampson *v.* Shaw, 101 Mass. 145 (1869).

[62] Raymond *v.* Leavitt, 46 Mich. 447, 9 N. W. 525 (1881).

[63] Lord Kenyon said in King *v.* Waddington, 1 East, 143, 158 (1800): "Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing with a view of afterwards dispersing the commodity which he collected in proportion to the wants and conveniences of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shews plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity, to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price; who can deny that this is an offence of the greatest magnitude?"

It may be added that it is on this point if at all that cases like Comer *v.* Burton, Lingo Co., 24 Tex. Civ. App. 251, 58 S. W. 969 (1900), and Gloucester Glue Co. *v.* Rus-

wrongful motive, *e. g.*, the primary purpose to secure command over the whole supply in a market and mulct the consuming public by exorbitant prices, there seems no ground [64] for holding the contracts void.

III

For over a century now the general social policy toward trade and industry fostered by the common law has been the policy of free competition. The courts have reflected the popular belief that the long-run interests of society are best promoted by allowing all individuals the fullest liberty of contract and freedom of action in business practically feasible. The courts even appear latterly to have held more tenaciously to this position than the common run of men. Nevertheless even in the law it has all along been recognized that some limitations upon the manner of conducting a competitive business were essential if the privileges of a few were not to destroy the privileges of others. The use of force or intimidation, of course, has from the beginning been denied men in business, though these means might be intended only to advance their own trade by undoing a rival. But aside from these obviously necessary restrictions upon the liberty to compete if social order was to be maintained — restrictions which of course applied to all other forms of social intercourse — the field of competition in trade and industry was kept extremely "open."

Gradually in the course of the nineteenth century, however, there grew up a legal doctrine by which the courts sought to regulate the conduct of business firms toward rival enterprises more specifically and more rigorously. This was the doctrine of unfair competition. As the very term implies, judgment of business practices upon ethical grounds, or at the least upon grounds of expediency, came to supplement the old unquestioning confidence in "free competition." This doctrine of unfair competition was a development of a branch of the law of fraud. Its aim was simply to prevent the deceitful sale or "passing off" of goods made by one person or firm for goods made by another. It operated to protect trade-marks and other bases of "good will" as property.

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sia Cement Co., 154 Mass. 92, 27 N. E. 1005 (1891), are to be distinguished. See also Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946 (1909), on importance of motive.

[64] Rex *v.* Webb and Pratt *v.* Hutchinson, *cit. supra.*

But so much had been a recognized legal policy in previous centuries. The change was in widening the application of the principle to all cases where one trader or manufacturer sought to take advantage of the good reputation of a competitor by causing confusion of their identity or the identity of their goods in the minds of purchasers or patrons.[65] In short, by the doctrine of unfair competition as it came to be developed, protection was afforded to business enterprises not only in the use of trade-marks and trade names but also in the enjoyment of their established commercial relationships.[66] The protection long accorded the symbol came finally to embrace the whole of the substance, if such it may be termed, — good will.

This was no mean addition to the social limitations upon competitive warfare in business. The doctrine undoubtedly covered much more than came under the general law of fraud.[67] It had a salutary effect upon the ethics of manufacture and trade, — directly, by curbing the commercial buccaneer who would profit from the enterprise of some one else; indirectly, by encouraging identification of products and standardization of quantity, quality, and price. Yet as almost the sole legal principle defining what was fair dealing in a competitive market, its scope[68] strikes the twentieth-century observer as very narrow indeed. It did not reach deliberate disparagement of a competitor's product,[69] unless a libel or slander was proved[70] of his character. It placed no bar to commercial spying, price discrimination, exclusive handling arrangements, or any of the other similar devices for throat-cutting

[65] Hogg *v.* Kirby, 32 Eng. Rep. 336 (1803); Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169 (1896).

[66] Reddaway *v.* Banham, 74 L. T. R. 289 (1896); American Waltham Watch Co. *v.* United States Watch Co., 173 Mass. 85, 53 N. E. 141 (1899); Eureka Fire Hose Co. *v.* Eureka Mfg. Co., 72 N. J. Eq. 555, 65 Atl. 870 (1907).

[67] See opinion of Lord Herschel in Reddaway *v.* Banham, 74 L. T. R. 289 (1896), and opinion of Holmes, J., in New Eng. Awl Co. *v.* Awl Co., 168 Mass. 154, 46 N. E. 386 (1897).

[68] See, however, Davis *v.* New England Ry. Pub. Co., 203 Mass. 470, 89 N. E. 565 (1909), as illustrating the elasticity of the doctrine of fraud.

[69] Canham *v.* Jones, 35 Eng. Rep. 302 (1813); White *v.* Mellin, [1895] A. C 154, Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86; Boynton *v.* Shaw Stocking Co., 146 Mass. 219, 15 N. E. 507 (1888); Hopkins Chem. Co. *v.* Read Drug Co., 124 Md. 210, 92 Atl. 478 (1914); Victor Safe Co. *v.* De Right, 147 Fed. 211 (1906).

[70] Davey *v.* Davey, 22 Misc. 668, 50 N. Y. Supp. 161 (1898); Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266 (1889); Ramharter *v.* Olson, 26 S. D. 499, 128 N. W. 806 (1910); also American Waltham Watch Co. *v.* Watch Co., 173 Mass. 85, 53 N. E. 141 (1899).

in the market. Only "palming off" one's goods as those of a business rival was forbidden.[71] For a rule of law thus circumscribed, the following encomium pronounced by the court in the case of *Dennison Manufacturing Company* v. *Thomas Manufacturing Company* [72] seems scarcely warranted:

"The gradual but progressive judicial development of the doctrine of unfair competition in trade has shed lustre on that branch of our jurisprudence as an embodiment, to a marked degree, of the principles of high business morality, involving the nicest discrimination between those things which may, and those things which may not, be done in the course of honorable rivalry in business."

The influence of the *laissez-faire* tenets was too persistent and too powerful to permit this judicial dream to become a judicial achievement. But the swelling tide of popular skepticism and discontent finally broke through the *laissez-faire* dam, and legislative regulation and administrative supervision of business competition were provided. The development has taken place almost entirely since the turn of the century, and ordinary industries (once termed "private") have come under commission control but slightly and in quite recent years. The states took the lead, Wisconsin being the pioneer. In the sphere of interstate trade the Clayton Act and the Federal Trade Commission Act were the fulfillment of these "progressive" [73] aspirations. It is significant that in the latter Act the powers of the Commission were extended to cover every "unfair method of competition in commerce," thus eliminating any doubt regarding the intention to expand the law beyond the confines indicated by the technical legal phrase "unfair competition." [74]

IV

SUMMARY AND CONCLUSION

The results of our brief survey of the common law covering market conduct as such may be thus summarized:

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[71] Rocky Mt. Bell Tel. Co. *v.* Indep. Tel. Co., 31 Utah, 377, 88 Pac. 26 (1906); G. W. Cole Co. *v.* American Cement Co., 130 Fed. 703 (1904); Citizens Light & P. Co. *v.* Montgomery Light & P. Co., 171 Fed. 553 (1909). See also Elgin Watch Co. *v.* Ill. Watch Co., 179 U. S. 665 (1901).

[72] 94 Fed. 651, 659 (1899).

[73] If not "Progressive."

[74] *Cf.* W. H. S. STEVENS, UNFAIR COMPETITION, particularly the introduction.

(a) A "restraint of trade" at common law meant an agreement not to enter or carry on an occupation within a prescribed territory. By the rule as finally evolved, a "restraint of trade" might be lawful or unlawful according as its provisions were reasonable or unreasonable, having regard both to the interests of the parties and the protection of the public. In the latter decades of the nineteenth century, courts came frequently to use the phrase in a general way as signifying "restriction of competition." The term was applied particularly to indirect and incipient monopolizing, — "pooling," as it was known in the industrial world. It served to cover a growing class of cases in which the purpose and power of monopoly were present though the form was lacking. Thus used, "restraints upon trade" were not subject to the "rule of reason" in the majority of American jurisdictions.

(b) Monopolizing at common law was removing or abolishing competition in any line of trade in any market (whatever its width) by a conspiracy among competitors. Essentially it was the acquisition of the power to control prices, not the abuse of the power or the effort to conserve it by obstructing the entrance of competitors into the field, which the courts combated.

(c) Barring outright force and fraud, the only conduct of one competitor toward another which might render him legally liable at common law for the too zealous prosecution of his business was the passing off of his own goods as the product of a competitor. This doctrine of "unfair competition," while comprehending more than such deception as would have been illegal in ordinary transactions as fraudulent deceit, still fell far short of providing an adequate moral code for business. Accordingly it has latterly been supplemented by legislative and administrative regulation of competition in trade and industry.

If the foregoing statements *re* the common law on market conduct be accepted, how do they bear upon the action of the federal courts in the Standard Oil, American Tobacco, and subsequent cases in modifying the theretofore accepted interpretation of the Sherman Act? The conclusion seems clear that the modification was unwarranted so far as it was sought to be justified by common-law principles. There is no sound legal basis discoverable in the authorities herein reviewed for distinguishing between "good"

trusts and "bad" trusts.[75] The common law condemned alike combinations whose behavior flagrantly violated common principles of honesty and fair dealing, as did the Standard Oil Company, and those whose behavior was more restrained and conformed more closely to accepted business usage, as did the United States Steel Corporation. Moreover, even if there be some semblance of logic in holding that "restraint of trade" as used in Section I of the Sherman Act implied the qualification of unreasonableness, there certainly can be no show of reason in extending the same qualification to Section II,[76] which forbids monopolizing and attempts to monopolize.

The ground upon which, if at all, it would seem possible to make out some legal justification for the changed judicial policy is that the laws defining what is unfair in trade competition and setting up administrative machinery for detecting and suppressing the same have the effect of sanctioning all forms of industrial consolidation, providing only that no unfair tactics be used in "killing off" competitors and no illegitimate methods of excluding potential competitors from the field be resorted to. But may this legislation be properly construed to have such far-reaching consequences? Does it represent so fundamental a change of public policy toward business enterprise? That such was not the intention of those who were responsible for the federal legislation, at least, is not open to argument. Mr. Wilson in political campaigns and public addresses again and again made his unalterable opposition to private monopoly, whatever its source and however benevolently conducted, perfectly evident. In addressing Congress on the subject of anti-trust legislation he explicitly declared: "Fortunately, no measures of sweeping or novel change are necessary. . . . We are all agreed that private monopoly is indefensible and intolerable and our program is founded upon that conviction." [77]

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[75] For the argument *contra*, see A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 830.

[76] Pulp Wood Co. *v.* Green Bay P. & F. Co., 168 Wis. 400, 170 N. W. 230 (1919). In the opinion the court declares: "While it is settled by judicial decisions that the 'restraint of trade' named in the statutes does not mean every restraint however trifling, but only an unreasonable or undue restraint, we do not understand that it has yet been held, by the court of last resort at least, that there may be a reasonable monopoly established by private persons at their own motion. . . ."

[77] JOUR. OF COMMERCE (New York), January 21, 1914, page 10.

The same view was taken by Congressional leaders,[78] and has been confirmed by the judiciary.[79] The provisions of the Clayton Act and the Federal Trade Commission Act must be held, on any imaprtial consideration of the evidence,[80] to have been plainly intended to supplement, not to supplant, the sweeping condemnation of monopolies and combinations in restraint of trade contained in the Sherman Act. Finally, it should be noted that in any case the evolution of public policy represented by the anti-trust measures of 1914 can have little part in the justification of the change in the judicial construction of the Sherman Act first manifested in 1911.

But though perhaps it may be granted that "rereading the Sherman Act in the light of common law" will hardly, if the reading be carefully done, warrant the change in judicial construction which is taking place, it is still open to those who look favorably upon this turn of affairs to defend the new policy on grounds of social expediency or national ecomony. Such indeed appears to me to be the true explanation of the flexure in the trend of decisions of the federal courts, particularly the Supreme Court. But the writer has been unable to find in the opinions in these important cases, or in the arguments, mainly deductive, of those who defend

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[78] See report of Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d. Sess., No. 597; and 51 CONG. REC., 11,381. Senator Cummins, quoting this report, stated:

"The Committee is of the opinion: 'First, that the statute [that is, the "Sherman" anti-trust act] should stand as the fundamental law upon the subject and that any supplemental legislation for more effective control and regulation of . . . commerce, should be in harmony with the purpose of the existing statute.' " See also his remarks on page 11,380 in answer to an argument by Senator Borah similar to the one propounded above (in the text).

[79] The first important case involving the scope of the powers of the Federal Trade Commission to reach the Supreme Court was Federal Trade Commission *v.* Gratz, 253 U. S. 421, 426 (1920). The majority opinion simply declared: "It is unnecessary now to discuss conflicting views concerning validity and meaning of the act creating the commission." But Justice Brandeis in an able dissenting opinion reviews the whole development of this legislation and shows quite incontestably that the view here taken of it is the only one that the facts support.

[80] This is the interpretation given these acts by Professor A. A. Young in a scholarly series of articles in 23 JOUR. OF POL. ECON., Nos. 3, 4, 5, and by economists generally. See article by W. H. S. Stevens in AMER. EC. REV., p. 840 (1914), and W. Z. RIPLEY, TRUSTS, POOLS, etc., revised edition, p. 703.

them, any convincing demonstration [81] of their soundness from the industrial or economic point of view. On the other hand, he believes the unsoundness of this new public policy toward business enterprise is capable of proximate proof inductively, and that is what will be attempted in a concluding article.

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(To be concluded.)

[81] There is no intention of asperity here. Indeed, the *method* pursued by the district court in reaching its decision in the principal case (223 Fed. 55) can only be commended.